UNITED STATES OF AMERICA
DISTRICT OF MAINE

TERRY STROUT, individually and as personal representative of the Estate of Doris Strout,	)	
Plaintiff	)	
v.	)	Civil No. 00-107-B
ANDREW PAISLEY, LAWRENCE GILLESPIE, LAR-ME TRUCKING COMPANY LTD. and MOONLIGHT TRANSFER, LTD.,	)	
Defendants	)	

O R D E R
RE: PLAINTIFF'S MOTION TO EXCLUDE EXPERT TESTIMONY

Plaintiff's Motion to Exclude Expert Testimony (Docket No. 13) has been referred to me by the District Court Judge. I note as a preliminary matter that the Defendants have requested oral argument and a recorded hearing in their response. (Docket No. 18). Pursuant to Local Rule 7(f), I see no reason to depart from the normal practice of rendering a decision based on the written submissions. Although any application of the *Eire* doctrine involves complexities, the parties have thoroughly addressed the relevant legal issues in their submissions. The request for oral argument is **DENIED.**

Turning to the merits of the Plaintiff's Motion to Exclude Expert Testimony, I am satisfied that based upon *Morton v. Brockman,* 184 F.R.D. 211 (D. Me. 1999), and the

overwhelming weight of authority from other jurisdictions, the Plaintiff's motion should be **GRANTED.**

Background

This case involves a motor vehicle accident. The Plaintiff's wife was thrown from the car and killed. The Defendants have designated two experts, a professional engineer specializing in biomechanics and a doctor of osteopathic medicine, who will both opine that Doris Strout was not restrained by a seatbelt at the time of the accident and that, had she been so restrained, her injuries would not have been so severe. The issue raised by this motion is the applicability of 29-A M.R.S.A. § 2081(5) to these proceedings in Federal Court. The relevant statutory provision provides as follows:

> 5. Evidence. In an accident involving a motor vehicle, the nonuse of seat belts by the operator or passengers or the failure to secure a child is not admissible in evidence in a civil or criminal trial, except in a trial for violation of this section.

In this diversity action removed from the state court by Defendants, it is Plaintiff's position that the expert witnesses are precluded from testifying about the decedent's nonuse of a seatbelt because of the above-referenced Maine statutory provision.

Discussion

This Court sitting in a diversity case must apply state substantive law and federal procedural law. *See Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). In evaluating an *Erie* question, courts are to be guided by two goals: "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). Complexity arises in this case, as in every difficult application of the *Erie* doctrine, in whether the state law provision in question is substantive law or merely an evidentiary rule of a procedural nature. If Section 2081(5) is an evidentiary rule only,

then the Federal Rules of Evidence, which do not contain an analogous exclusionary provision, would apply and the evidence could be deemed relevant and admissible under Rules 401 and 402 on the issues of comparative negligence, failure to mitigate, and damages. However, if Section 2081(5) is substantive in nature, *Erie* dictates that the prohibition against admission of this evidence must be applied in this Court.

In *Morton v. Brockman*, 184 F.R.D. 211, 215-16 (D. Me. 1999), this Court found that Section 2081(5) was substantive in nature. The Court concluded that reasoned application of the *Eire* Doctrine required that the so-called "seat belt defense," unavailable in Maine courts, likewise should be unavailable in this Court. *Id*. at 215. Factually, the only difference between this case and *Morton* is that in this case the decedent was a passenger in the vehicle and in *Morton* the decedent was the operator of the vehicle. *See id.* at 211. As in Morton, the defendants here seek to introduce evidence of seatbelt nonuse under FRE 401 and 402 on the issues of negligence and failure to mitigate damages. Defendants argue that *Morton* is not controlling because the current law now imposes a statutory duty on the operator to secure all passengers in a seat belt. *See* 29-A M.R.S.A. § 2081(3-A). Furthermore, the Defendants contend that *Fitzgerald v. Expressway Sewerage Construction, Inc.*, 177 F.3d 71 (1st Cir. 1999), a post-*Morton* case, requires this Court to treat a statutory provision such as Section 2081(5) as merely a state evidentiary rule that is necessarily preempted by the Federal Rules of Evidence.

Defendants first argue that the resolution of this issue in *Morton* and its antecedent cases, *Wardwell v. United States*, 758 F. Supp. 769 (D. Me. 1991) and *Pasternak v. Achorn*, 680 F. Supp. 447 (D. Me. 1988), rests on the fact that Maine law at the time in question did not require all drivers, regardless of age, to wear seatbelts. These

cases do acknowledge that the operator had no statutory duty to wear a seatbelt and that therefore the seatbelt nonuse evidence was of limited or perhaps no relevance on the issue of negligence. However, in discussing the absence of any statutory duty in these cases, this Court was merely commenting on *evidentiary relevance,* not on the substantive nature of the policy. That analysis might or might not be effected by the change in the language of Section 2081(3-A). Furthermore, the underlying state policy of creating a legislative exclusion of evidence of seatbelt nonuse remains unchanged under the current version of statute.

Even in *Wardwell v. United States,* another District of Maine case in which the Court admitted evidence of the nonuse of seatbelts, the admission was limited to the causative negligence, if any, of the operator of the vehicle on the Defendant's counterclaim for contribution. *See* 758 F. Supp. at 771. The court in *Wardwell* considered whether a provision providing that failure to secure a child could not be considered negligence imputed to the child and prohibiting use of such evidence in any civil action could be substantive with respect to the child plaintiff, but "not substantive" with respect to the operator. *Id.* at 771-72 & n.3. The statute under consideration in that case and the present statute are different. Furthermore, the use sought to be made of the evidence of seatbelt nonuse in this case is against the plaintiff passenger on the primary complaint, a far different evidentiary use than the one countenanced in *Wardwell.*

In *Fitzgerald v. Expressway Sewerage Construction, Inc.*, 177 F.3d 71 (1st Cir. 1999), the First Circuit recognized that the Massachusetts collateral source rule that prohibited the mitigation of damages by reference to first-party insurance proceeds received by a plaintiff was a matter of substantive law. However, the aspect of the

Massachusetts collateral source rule at issue in *Fitzgerald* was, in the narrow context of that case, merely a common law evidentiary rule. *See Fitzgerald*, 177 F.3d at 73-74 ("The question raised but not clearly answered by the case law is whether, in diversity cases, *state evidentiary rules* regarding compensation from collateral sources should displace the Federal Rules of Evidence.") (emphasis added). Because the issue was framed in this way, the court was considering which evidentiary rules, state or federal, would govern. *See id.* at 73 ("The case law sometimes confuses these interrelated principles, moving effortlessly *from the substantive to the evidentiary strands* of the collateral source doctrine, and back, with little differentiation. This blurring has potentially deleterious consequences in diversity cases, [which] necessitate disentangl[ement of] substantive rules from procedural ones.") (emphasis added). By counterpoising the evidentiary "strand" of the collateral source rule against the substantive "strand," the court, in effect, made it clear that it considered the evidentiary strand of the rule to be procedural in nature. Additionally, by labeling the rule as a common law evidentiary rule, the court was justified in deferring to the FRE because "[I]t is . . . axiomatic . . . that federal evidentiary rules govern in diversity cases." *Id.* at 74. *Fitzgerald* does not answer the question posed by this case.

As this Court noted in *Morton*, the overwhelming majority of courts which have considered this issue in other jurisdictions have determined that a legislative policy requiring the exclusion of evidence of seatbelt nonuse is a matter of substantive law. *See Morton*, 184 F.R.D. at 215 (collecting cases). Although some of those cases may have ultimately allowed evidence of seatbelt nonuse, they uniformly acknowledged that it was a matter of substantive law of the state, the issue being a matter of interpretation of the

state law. *See, e.g., Gardner v. Chrysler Corp*. 89 F.3d 729, 736 (10th Cir. 1996) ("Kan. Stat. Ann. § 8-2504(c) is not simply a rule of evidence, which we could then ignore under our diversity jurisdiction, but represents the substantive law of Kansas, one 'concerned with the channeling of behavior outside the courtroom, and where as in this case the behavior in question is regulated by state law rather than by federal law, state law should govern even if the case happens to be in federal court.'")

The most helpful discussion relating to the difference between procedural and substantive law in the context of the seatbelt nonuse is found in *Barron v. Ford Motor Co. of Canada*, 965 F.2d 195 (7th Cir. 1992). Judge Posner discussed the North Carolina statute, substantially identical to Maine's, and the North Carolina common law rule upon which the statute was based, in the following terms:

> Well, but is it a rule of evidence for purposes of the *Erie* doctrine, or is it a substantive rule and therefore binding in a diversity case (or any other case in which state law supplies the rule of decision)? The difference is this. A pure rule of evidence, like a pure rule of procedure, is concerned solely with accuracy and economy in litigation and should therefore be tailored to the capacities and circumstances of the particular judicial system, here the federal one; while a substantive rule is concerned with the channeling of behavior outside the courtroom, and where as in this case the behavior in question is regulated by state law rather than by federal law, state law should govern even if the case happens to be in federal court. The North Carolina rule could be either. It is a rule of evidence if it is motivated by concern that jurors attach too much weight to a plaintiff's failure to wear his seatbelt. It is a substantive rule if it is designed not to penalize persons who fail to fasten their seatbelts. Many rules mix procedural or evidentiary with substantive policy concerns. . . .

Id. at 199 (citation omitted). Judge Posner ultimately determined that the rule is substantive whenever the evidence is offered to show either contributory fault or to

mitigate damages under a theory of "avoidable consequences."[1] *See id.* at 199; *see also id.* at 200.

In the present case the Defendants seek to admit the evidence of seatbelt nonuse "for purposes of establishing the defenses of comparative negligence and failure to mitigate and on damages." (Defendants' Objection to Plaintiff's Motion to Exclude Expert Testimony, p. 4). When they seek to use the seatbelt nonuse evidence for those purposes, Defendants cannot avoid the substantive law of the State of Maine. As Defendants themselves point out, *Wardwell* is consistent with *Fitzgerald* in recognizing that any rule, whether common law or statutory, may have both substantive and evidentiary components. In this District, *Wardwell* is a case that addresses the evidentiary component of the seatbelt rule and *Morton*, the substantive. The present case is akin to *Morton*, and for the reasons stated therein, runs afoul of the substantive law of Maine pertaining to evidence of seatbelt nonuse. Therefore, Plaintiff's Motion to Exclude Experts' Testimony regarding passenger's nonuse of a seatbelt, insofar as it relates to the issues of comparative negligence, failure to mitigate and damages, is **GRANTED.**

CERTIFICATE

A. The Clerk shall submit forthwith copies of this Order to counsel in this case.

B. Counsel shall submit any objections to this Order to the Clerk in accordance with Fed. R. Civ. P. 72.

So Ordered.

[1] Judge Posner also observed that evidence of nonuse of seatbelts would be irrelevant on the issue of contributory negligence because "[w]earing a seatbelt does not make it less likely that you will have an accident—it could make it more likely, at least if you're the driver, by making you feel safer." *Barron*, 965 F.2d 199. I add that it is even more evident that nonuse of a seatbelt has no bearing on a passenger's contributory negligence, even assuming that any contributory negligence could otherwise be shown.

Dated this 4th day of December, 2000.

Margaret J. Kravchuk
U.S. Magistrate Judge

STNDRD

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-107

STROUT v. PAISLEY, et al Filed: 05/24/00
Assigned to: Judge GEORGE Z. SINGAL Jury demand: Both
Demand: $0,000 Nature of Suit: 350
Lead Docket: None Jurisdiction: Diversity
Dkt # in PENOBSCOT SUPERIOR : is CV-00-93

Cause: 28:1332 Diversity-Personal Injury

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v.	
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LAWRENCE GILLESPIE defendant	FREDERICK J. BADGER, JR. (See above)
LAR-ME TRUCKING CO, LTD defendant	FREDERICK J. BADGER, JR. (See above)

MOONLIGHT TRANSFER, LTD defendant	FREDERICK J. BADGER, JR. (See above)
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ANDREW PAISLEY counter-claimant	FREDERICK J. BADGER, JR. 945-5900 RICHARDSON, WHITMAN, LARGE & BADGER P.O. BOX 2429 ONE MERCHANTS PLAZA, SUITE 603 BANGOR, ME 04402-2429 (207) 945-5900
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v.	
TERRY STROUT counter-defendant	STEVEN D. SILIN [COR LD NTC] BERMAN & SIMMONS, P.A. P. O. BOX 961 LEWISTON, ME 04243-0961 784-3576 GERARD O. FOURNIER LAW OFFICES OF GERARD O. FOURNIER 27 PEARL STREET P.O. BOX 7109 PORTLAND, ME 04112-7109 (207) 773-7352